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BEST VENUE SDN BHD v. ALLIANZ GENERAL INSURANCE COMPANY (M) BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[SUIT NO: 22NCC-1530-10-2012]
B 25 MARCH 2015

INSURANCE: *Claims – Indemnity – Repudiation of claim – Insurance coverage in event exhibition was cancelled – Organiser entered into agreement with third party – Third party undertook to deliver space shuttle as star attraction for exhibition – Event cancelled due to non-delivery of space shuttle – Whether exhibition was possible without space shuttle – Whether material facts disclosed – Whether entitle repudiation of liability by insurer – Whether organiser suffered any loss – Whether losses proven*

INSURANCE: *Insurance clause – Construction of – Organiser paid for insurance coverage in event exhibition was cancelled – Organiser entered into agreement with third party for delivery of space shuttle as star attraction for exhibition – Event cancelled due to non-delivery of space shuttle – Whether third party participant of exhibition – Whether organiser's claim fell within insuring/operative clause – Whether there was breach of insurance policy*

The plaintiff, the organiser of the Malaysian International Aerospace Exhibition 2007 ('the exhibition'), had entered into an agreement with Mactus (Malaysia) Sdn Bhd ('Mactus') where the latter undertook to, *inter alia*, deliver a Russian space shuttle ('the BURAN'). The BURAN was said to be the star attraction of the exhibition. The plaintiff had secured a sponsorship from the Ministry of Tourism Malaysia ('Tourism Ministry') in the sum of RM37 million and out of the said sum, RM36.3 million had been paid to the plaintiff by the Tourism Ministry. For the purpose of the insurance coverage for the exhibition, the plaintiff paid to the defendant a full premium of RM617,410 for a maximum indemnity sum of RM42 million in the event the exhibition was cancelled, postponed, abandoned or interrupted within the period of 2 February 2007 to 7 August 2007 ('the policy'). Due to the non-delivery of BURAN, the exhibition was cancelled and this was communicated to the defendant on 20 July 2007. On 30 July 2007, the plaintiff issued a notice of its claim for indemnity under the policy but the claim was repudiated by the defendant on 2 September 2009. Hence, the present claim for the sum of RM30,645,529.38. The issues that arose for the court's determination were (i) whether Mactus was a participant of the exhibition; (ii) whether the plaintiff's claim fell within the insuring/operative clause; (iii) whether the plaintiff had failed to disclose material facts based on which the defendant was entitled to repudiate liability; (iv) whether the claim arose out of or was contributed to or resulted

from a contractual dispute or breach by the plaintiff and was therefore excluded by cl. 6.3; (v) whether the plaintiff was in breach of cl. 7.4 in failing to take steps to pursue all rights and remedies available for the alleged loss; and (vi) whether the plaintiff had suffered any loss and whether the same was proven.

Held (dismissing claim with costs):

(1) The definition of 'participant' in cl. 2.10 of the policy is a general definition which is to be read in the context of the event that is to be covered. The words 'performs' should not be limited to mere 'performances in a concert' as the dictionary meaning include performing (do) a task. Mactus came within the definition of participant in the policy as Mactus was the party that performed the essential function needed for the successful fulfilment of the exhibition. (para 34)

(2) The non-delivery of the BURAN was not due to a cause beyond the control of Mactus. The plaintiff had failed to show that they (the assured and the participant) had taken reasonable steps to avoid the event stipulated in the clause, that was, the cancellation of the exhibition due to the non-delivery of the BURAN. It certainly made no sense for a party whose act created the problem in the first place and the deliberately refusing to make good the problem to claim that he could not perform because the same problem was beyond his control. (paras 39 & 56)

(3) It was common ground that the 'material facts' in this case was that without the BURAN, it was impossible to stage the exhibition. The obligation was on the plaintiff, as the assured, to disclose all material facts to the defendant, the insurer, when proposing for the event cancellation coverage for the exhibition. However, there was no issue of non-disclosure of material facts as on the balance of probability, the defendant had known about this material fact and this could have been disclosed by the plaintiff during the negotiations. (paras 65 & 71)

(4) There was no ambiguity in cl. 6.3 and the words used should be given effect. The use of the word 'or' between the phrase 'any contractual dispute' and 'breach by the assured' means that the clause must be read disjunctively. The exclusion of the losses could not be limited only to the insured's own actions or breaches. The phrase 'any contractual dispute' is distinct from the phrase 'breach by the assured'. The phrase 'any contractual dispute' is wider and it included the dispute between Mactus and the plaintiff under the agreement. This was especially so when the breach by Mactus was the sole cause for the cancellation of the exhibition. Under cl. 6.3 of the policy since the alleged loss was due to the contractual dispute between the plaintiff and Mactus, the same was excluded under the policy. (paras 76 & 77)

(5) Clause 7.4 stipulated that the plaintiff shall allow the defendant to pursue 'all rights or remedies' available to the plaintiff. There was no evidence that the plaintiff had breached cl. 7.4 by denying the defendant the right to pursue the remedies available to the plaintiff. Therefore, there was no breach of cl. 7.4. (para 81)

(6) The plaintiff did incur cost and expenses. The amount spent might come from the sponsorship agreement but under the agreement, the rights, obligations and liabilities of the parties had been spelt out. Therefore, the sponsorship deal was a matter within the plaintiff's right to claim for the expenses incurred under the insurance policy, for the purpose of paying back the public fund. If the plaintiff was to be indemnified under the policy and since all the expenses were paid from the sponsorship from the Tourism Ministry, it would only be proper that the same be remitted back to the Malaysian taxpayers. The sum of RM30,645,529.38 from the insurance claim was to be paid into the consolidated fund. (para 86)

Case(s) referred to:

Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330 HC ***(refd)***
Azizah Abdullah v. Arab-Malaysian Eagles Sdn Bhd [1996] 3 CLJ 426 HC ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(foll)***
Chiew Swee Chai v. British American Insurance Co (M) Sdn Bhd [1986] 1 CLJ 408; [1986] CLJ (Rep) 316 HC ***(refd)***
Chung Kuo Ping v. Malaysian Assurance Alliance Bhd [2008] 3 CLJ 752 CA ***(refd)***
Electro Cad Australia Pty Ltd & Ors v. Mejati RCS Sdn Bhd & Ors [1998] 3 CLJ Supp 196 HC ***(refd)***
Goldlion Properties Ltd v. Regent National Enterprises Ltd [2009] HKCFA 58 ***(foll)***
Holcim (Singapore) Pte Ltd v. Precise Development Pte Ltd [2011] 2 SLR 106 ***(foll)***
Meuban Engineering & Equipment Sdn Bhd v. MBF Insurans Bhd [2009] 7 CLJ 527 HC ***(refd)***
Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***
Pan Atlantic Insurance Co v. Pine Top Insurance Co Ltd [1995] 1 AC 501 ***(refd)***
Union Insurance Malaysia Sdn Bhd v. Chan You Young [1999] 3 CLJ 517 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 57
Insurance Act 1996, s. 150

For the plaintiff - Nathan (Ian Pereira with him); M/s Lawrence Pereira & Partners
For the defendant - Liew Teck Huat (Lim Qi Si & Wee Jason with him); M/s Suflan TH Liew & Partners

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi J:

Introduction

[1] The plaintiff's claim against the defendant is premised on an event cancellation insurance policy, the "Event, Cancellation, Abandonment, Postponement or Interruption Policy No. 07AKL000552" dated 7 February 2007 ('the policy'). The policy was taken by the plaintiff to cover the cost and expenses in the event that its exhibition, the Malaysian International Aerospace Exhibition 2007 ('the exhibition'), initially scheduled to be held from 5 June 2007 to 7 August 2007, are cancelled.

[2] The exhibition, which was postponed to the 28 July 2007 was indeed cancelled, as the plaintiff said that they could not retrieve the star attraction for the exhibition, the Russian space shuttle the 'BURAN'.

[3] The plaintiff issued a notice of its claim for indemnity under the policy. The defendant repudiated the claim *vide* its notice dated 2 September 2009.

[4] The plaintiff sued the defendant for the sum of RM30,645,529.38 under the policy. After hearing all the evidence, the plaintiff's claim was dismissed by this court.

The Salient Facts

[5] The plaintiff is a company incorporated in Malaysia and is involved in outdoor advertising media and event management.

[6] The defendant is a public listed company incorporated in Malaysia and carrying on the business of general insurance.

[7] The plaintiff was the organiser of the exhibition to be held between 5 June 2007 and 7 August 2007 at the Sultan Abdul Aziz Shah, Airport Subang, Selangor. The exhibition was supposed to be held in conjunction with Visit Malaysia Year 2007.

[8] The plaintiff appointed Mactus (Malaysia) Sdn Bhd ('Mactus') as the event manager of the exhibition. The majority shareholder of Mactus was a Singaporean by the name of Kevin Tan Swee Leon ('Kevin Tan').

[9] The plaintiff entered into an agreement with Mactus on 26 October 2006 ('the Mactus agreement'). Under the terms of the Mactus agreement, Mactus is to take all the necessary steps in conjunction with the exhibition, including the getting up of exhibits, appointment of contractors, the design production, provision of tents, the flooring system and the implementation of a ticket marketing network. Under the schedules to the Mactus agreement, Mactus is to be paid RM19 million. Of the said sum, the plaintiff has paid RM13,317,651.40 to Mactus.

[10] Of course, under the Mactus agreement, Mactus also undertook to deliver the BURAN and other aeronautic exhibits for the exhibition. The BURAN is said to be the star attraction of the exhibition.

[11] The BURAN was owned by Space Shuttle World Tours Pte Ltd, a company incorporated in Singapore ('SSWT'). SSWT is wholly owned by Mactus (Singapore). Mactus was the representative of SSWT in Malaysia and was authorised to lease the BURAN to the plaintiff.

[12] For the purposes of the exhibition, the plaintiff had secured a sponsorship from the Ministry of Tourism Malaysia in the sum of RM37 million. Under cl. 5 of the sponsorship agreement with the ministry, which was signed in September 2006, the disbursement of the sponsorship sum is in the following manner:

Description	Amount	%	Month
30 days upon signing of this Agreement	RM11.1 million	30	Sept 2006
60 days from the date of this Agreement	RM3.7 million	10	Nov 2006
150 days from the date of this Agreement	RM11.1 million	30	March 2007
210 days from the date of this Agreement	RM7.4 million	20	May 2007
30 days after the Exhibition	RM3.7 million	10	September 2007
Total	RM37,000,000	100	-

[13] It is not in dispute that out of the RM37 million sponsorship, the sum of about RM36.3 million had been paid to the plaintiff by the Tourism Ministry, from the public coffers.

[14] For the purposes of the insurance coverage for the exhibition, the plaintiff secured the policy from the defendant, with a premium of RM617,410. The policy dated 7 February 2007 was for the insurance period of 2 February 2007 to 7 August 2007. The policy is to indemnify the plaintiff in the event that the exhibition was cancelled, postponed, abandoned or interrupted.

[15] The BURAN was supposed to make a spectacular landing at the exhibition, to be witnessed by the Honourable Prime Minister himself. But *via* a letter dated 9 March 2007 issued by Mactus, and signed by Kevin Tan, the plaintiff was informed that Mactus was unable to fly the BURAN into Malaysia. Instead, the BURAN is to be transported by sea from the Port of Bahrain to Port Klang on board the vessel, m.v CEC HUNTER.

[16] The vessel, m.v CEC HUNTER arrived in Bahrain and was waiting to load the BURAN since 31 March 2007. The BURAN was loaded on the barge but did not get customs clearance to leave the port due to on-going legal proceedings in the Bahrain Courts between SSWT and NPO Molniya.

[17] NPO Molniya ('Molniya') was the previous Russian owners of the BURAN. Molniya had obtained a judgment against SSWT for non-payment of the purchase price of the BURAN in the courts in Bahrain. The legal embroilment gets more complicated when Molniya had sold the BURAN to the Auto & Technik Museum at Sinsheim, Germany, who is also claiming ownership of the BURAN.

[18] Between March to May 2007, the plaintiff made several attempts to secure the BURAN. Kevin Tan from Mactus, it seems, was also seen scuttling here and there in Bahrain. Despite the assistance from both the Tourism Ministry and the Malaysian Embassy in Bahrain, the plaintiff could not obtain the release of the BURAN.

[19] On 29 May 2007, the plaintiff gave notice to the defendant that the commencement of the exhibition was to be postponed to 28 July 2007.

[20] By a letter dated 20 July 2007, the plaintiff informed the defendant that the exhibition under the policy had to be cancelled due to the non-delivery of the space shuttle BURAN.

[21] On 30 July 2007, the plaintiff wrote to the defendant giving notice of intention to claim for the losses suffered as a result of the cancellation of the exhibition. The notice was given during the currency of the period of insurance.

[22] By a letter dated 2 September 2009, the defendant issued a notice repudiating the claim detailing the grounds of the repudiation.

The Issues To Be Tried

[23] From the submissions of the parties, the issues to be tried are as follows:

(i) whether the cancellation of the exhibition was due to a cause 'beyond the control of the plaintiff and a participant' such as to bring it within the insuring clause ('whether the claim is within the operative clause');

(ii) whether on the facts and on the proper construction of the insuring clause read with the definition clause, Mactus is a 'participant' for the purpose of the exhibition ('whether Mactus was a participant');

(iii) whether in proposing for the event cancellation coverage, the plaintiff has failed to make disclosure of material facts based on which, the defendant was entitled to repudiate liability ('the non-disclosure issue');

(iv) whether the claim arose out of or was contributed to or resulted from a contractual dispute or breach by the plaintiff and is therefore excluded by cl. 6.3 ('exclusion cl. 6.3');

(v) whether the plaintiff is in breach of a condition precedent, cl. 7, in failing to take steps to pursue all rights and remedies available to them for the alleged loss ('breach of warranty'); and

(vi) whether the plaintiff has suffered any loss, and whether the same is proven ('loss').

The Findings Of The Court

[24] It is not in dispute that the defendant had issued the policy to cover the plaintiff's costs and expenses in the event of the cancellation of the exhibition. The plaintiff has paid the full premium of RM617,410 for a maximum indemnity sum of RM42 million covering the period of insurance from 2 February 2007 to 7 August 2007. It is also not in dispute that the exhibition was cancelled during the period of insurance and the plaintiff had given a notice of claim to the defendant on 30 July 2007, during the currency of the period of insurance.

Issues (i) & (ii)

Whether The Plaintiff's Claim Falls Within The Insuring/Operative Clause

[25] It is common ground that for the plaintiff to succeed in its insurance claim, the loss must fall within the insuring clause, cl. 1.1 of the policy. Therefore, in order to succeed in this case, the onus is on the plaintiff to prove on the balance of probabilities that its claim falls within cl. 1.1, which reads:

> Subject always to the terms, conditions, limitations and exclusions contained herein or endorsed hereon this Insurance is to indemnify the Assured for their Ascertained Net Loss should [the Exhibition] be necessarily Cancelled, Abandoned, Postponed, Interrupted or Relocated, in whole or in part, which necessary Cancellation, Abandonment, Postponement, Interruption or Relocation is the sole and direct result of any cause beyond the control of the Assured and the Participant therein.

[26] In order to bring a claim under the insuring cl. 1.1, the plaintiff will have to prove that:

(i) the sole cause for the cancellation of the exhibition is the non-delivery of the BURAN ; and

(ii) the non-delivery of the BURAN for the exhibition was beyond the control of the assured and the participant.

[27] It is not in dispute that sole cause for the cancellation of the exhibition is the non-delivery of the BURAN. The issue then is to ascertain whether the non-delivery of the BURAN was beyond the control of the assured and the participant.

[28] Before we deal with the term 'beyond the control' of the assured and the participant, we need to ascertain who is the 'participant' in the context of cl. 1.1 of the policy.

Is Mactus A Participant Within The Insuring Clause

[29] In construing the terms of a contract, where the words used are clear, such words must be given effect. In *Chiew Swee Chai v. British American Insurance Co (M) Sdn Bhd* [1986] 1 CLJ 408; [1986] CLJ (Rep) 316; [1987] 1 MLJ 53, the court held at p. 318 (CLJ); p. 53 (MLJ):

> Of course the interpretation should be reasonable, and of course any ambiguities should be resolved against the person in whose favour the document has been framed ... **But where the words of the policy are crystal clear it is the view of this court that the sanctity of the contract should be upheld.** (emphasis added)

[30] But if there are ambiguity, then the court must ascertain the intention of the parties. In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, the Federal Court held that:

> The most recent statement of the guideline to interpretation of contracts statutes and other instruments is to be found in *Attorney General of Belize v. Belize Telecom Limited* [2009] UKPC 10, where when delivering the Advice of the Board, Lord Hoffmann said:
>
> > *The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.* However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912-913. *It is this objective meaning which is conventionally called the intention of the parties,* or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument. (emphasis added)

[31] Participant is specifically defined in cl. 2.10 of the policy as follows:

> Participant means any person who performs or would perform any essential function needed for the successful fulfilment of the Insured Event(s).

[32] The plaintiff, however submitted that because the policy is a standard policy form that is used for various types of 'Event, Cancellation, Abandonment, Postponement or Interruption Policy' including the ones that are used for concert performance, then the definition of 'participant' in cl. 2.10 should have been modified or deleted as this is not a concert or performance where the role of the participant is an integral part of the event. This according to the plaintiff, is in line with the decision in *Meuban Engineering & Equipment Sdn Bhd v. MBF Insurans Bhd* [2009] 7 CLJ 527, which applied the maxim *noscitur a socilis*, which permit the court to ascertain the meaning of a word by looking at the context it appears.

[33] I am of the considered opinion that the definition of 'participant' in cl. 2.10 is a general definition which is to be read in the context of the event that is to be covered. The words 'performs' should not be limited to mere 'performances in a concert' as the dictionary meaning includes performing (do) a task. (see *Oxford Dictionary*)

[34] In the case before us, it is the submission of the defendant that from the pleadings and the facts of this case, Mactus comes within the definition of participant in the policy, as Mactus is the party that performs the essential function needed for the successful fulfilment of the exhibition. Having considered the pleadings and the evidence, I find that there is merit in the defendant's submission. My reasons are as follows:

(i) the defendant has pleaded that the alleged loss did not fall within the insuring clause because the non-arrival of the BURAN was not beyond the control of Mactus, a participant within the meaning of the insuring clause. In para. 27(c) of the amended defence, the defendant pleads that:

> Further or alternatively, even if, which is denied, the non-delivery of the BURAN , was the sole and direct cause of the cancellation of the MIA 2007, the non-delivery was not beyond the control of the Plaintiff and/or Mactus who was the 'Participant' within the meaning of the insuring clause.

(ii) in response, the plaintiff filed an amended reply. At para. 6(c), the plaintiff pleads that:

> The fact that non-delivery of the BURAN was beyond the control of the Plaintiff and/or Mactus is evident from the facts pleaded in paragraphs 21 to 56 of the amended Statement of Claim.

(iii) therefore, premised on the pleadings, the plaintiff did not deny that Mactus was a participant and had actually made a positive averment that the non-delivery of the BURAN was beyond the control of the Mactus. Thus, the plaintiff is bound by its pleading that Mactus was a participant within the insuring clause;

(iv) in any event, the documentary evidence shows that Mactus was the participant in every respect. The clearest indication of this is the Mactus agreement, which the plaintiff entered into with Mactus, which was led and represented by Kevin Tan. Kevin Tan was also director and majority shareholder of Mactus Singapore. Mactus Singapore in turn owns all the shares in SSWT, the company which claimed to be the owner of the BURAN. Kevin Tan was also the majority shareholder and director of Mactus Malaysia. As such, I am of the considered opinion that Kevin Tan was the *alter ego* of the Mactus entities, including SSWT as he was, in every respect, the guiding hand and the directing mind of Mactus. (see *Electro Cad Australia Pty Ltd & Ors v. Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ Supp 196);

(v) from the Mactus agreement, Part A of the agreement is the description of the service to be provided by Mactus, from the preparation of the concept and design of the exhibition, the management including ticketing, and the running of the exhibition. It is beyond doubt that Mactus involvement in the exhibition was indispensable and for these services, Mactus was to be paid RM13 million;

(vi) part B of the Mactus agreement dealt with the provision for the exhibits for the exhibition. All the exhibits for the exhibition were to be provided by Mactus, and this includes the BURAN , space artefact gallery, space shuttle demonstration, astronaut training show, space theatres, 3D theatre, simulator, Mars exploration and astronaut fitness. From this Part B, it is clear that without the supply of the exhibits from Mactus, there will be no exhibition. Under Part B, Mactus is to be paid RM6 million;

(vii) apart from the RM13 million for services rendered and RM3 million for the exhibits (total of RM16 million), Mactus is also entitled to revenue sharing from the proceeds of ticket sales; and

(viii) therefore, from Mactus agreement itself, Mactus involvement was 'essential for the fulfilment of the event'. Without Mactus providing management services and the exhibits, there would be no successful fulfilment of the event. Premised on *Berjaya Times Square*'s case, and based on the intention of the parties that Mactus involvement was 'essential for the fulfilment of the event', I am therefore of the considered opinion that Mactus is a 'participant' within the meaning of the definition cl. 2.10 of the policy.

'Beyond The Control' (Of The Assured And The Participant)

[35] Next, we consider the key phrase, 'beyond the control' of the assured (the plaintiff) and the participant (Mactus) in the insuring clause. Conceptually, the term 'beyond the control' has been used in the context of *force majeure* or contractual frustration situations. Therefore, a *force majeure* clause would provide that a contracting party is excused from performance due to a number of causes such as natural calamities, unrest or war, which are 'beyond the control' of the contracting parties.

[36] In *Holcim (Singapore) Pte Ltd v. Precise Development Pte Ltd* [2011] 2 SLR 106, one of the issues before the court was whether there was an obligation on the party seeking to rely on the *force majeure* to show that it took all reasonable steps to avoid the *force majeure*. The court agreed with the Hong Kong Court in *Goldlion Properties Ltd v. Regent National Enterprise Ltd* [2009] HKCFA 58 and held at para. 66:

> Whether the affected party must have taken all reasonable steps before he can rely on the *force majeure* clause depends, in the final analysis, on the precise language of the clause concerned. Nevertheless, it might well be the case that, *at lease where the clause in question relates to events that must*

A *be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event or events stipulated in the clause.* In such a situation (as in fact the case in the present proceedings), there is, in our view, a persuasive case of requiring the affected party to take reasonable steps to avoid the effects of the event in question. The rationale for this approach is a simple and commonsensical one: *to the extent*
B *that the party or parties concerned do not take reasonable steps to avoid the event or events in question, it cannot be said that the occurrence of the event or events was beyond the control of the party or parties concerned - in which case the clause would not apply*. (emphasis added)

[37] I am of the considered opinion that the principles set out by the court
C in *Holcim*'s case with regards to the *force majeure* clause is also applicable in construing the term 'beyond the control' in the insuring clause in event cancellation policy. I agree with the defendant that it certainly makes no sense for a party whose act created the problem in the first place and then deliberately refusing to make good the problem to claim that he cannot
D perform because the same problem was beyond his control.

[38] The defendant also relied on s. 57 of the Contracts Act 1950, on the doctrine of frustration, for guidance in interpreting the phrase 'beyond the control'. Therefore, where parties have entered into a contract, a supervening act happened, rendering it impossible for one party to perform the contract,
E the contract is said to be frustrated and performance is excused. In *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293, the Federal Court held that:

A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be
F considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into ...
G **A contract is frustrated when subsequent to its formation; a change of circumstances renders the contract legally or physically impossible to be performed …** (emphasis added)

[39] Bearing in mind that the sole cause for the cancellation of the exhibition is the non-delivery of the BURAN , in order to ascertain whether
H the non-delivery of the BURAN was beyond the control of the assured and the participant, the onus is on the assured to show that they (assured and participant) have taken reasonable steps to avoid the event stipulated in the clause, that is, the cancellation of the exhibition due to the non-delivery of the BURAN.

I **[40]** It is the submission of the plaintiff that the non-delivery of the BURAN was due to the legal proceedings in the courts in Bahrain. The legal proceeding in Bahrain was the ownership tussle between Molniya and SSWT

over the BURAN. The plaintiff submits that it had no control over the proceedings in Bahrain, and neither were any of its alleged participant parties in the legal proceedings in Bahrain.

[41] The plaintiff submits that the litigation in Bahrain was sudden and totally unanticipated and that they have spurred into action; and together with Mactus, made a concerted effort to salvage the situation. They took steps to lift the restraining orders and obtained an order for the release of the BURAN. However, an appeal was lodged and a subsequent restraining order was obtained by the German Museum, which had also bought the BURAN from Molniya. The plaintiff says that it had an unfruitful meeting with the German Museum and the attempts made by the Tourism Ministry also failed to solve the problem. Thus, despite the plaintiff's best efforts, the BURAN could not be released. Hence, the plaintiff submits that the events that unfolded in Bahrain were out of its control, and therefore the cancellation of the insured exhibition was beyond the control of the insured.

[42] However, having considered the evidence before me, I am of the considered opinion that it cannot be said that the plaintiff and Kevin Tan and/or Mactus have taken all reasonable steps to avoid the cancellation of the exhibition due to the non-delivery of the BURAN.

[43] It must be emphasised here that the exhibition was cancelled because Mactus was not able to deliver the BURAN for the exhibition under the Mactus agreement. And it cannot be denied that Mactus cannot deliver the BURAN because of ownership dispute over the BURAN which had spawned protracted litigation in Bahrain.

[44] It is the plaintiff's case that they have done a due diligence exercise in Singapore in June 2006 and from the documents given to them, such as the deed of conveyance between NPO Molniya and SSWT, the bill of lading, the invoice issued by Molniya and the certificate of ownership, confirmed that SSWT as the owner of the BURAN. Premised on these documents, it is the plaintiff's case that SSWT was the owner of the BURAN. And given that Kevin Tan was the person in charge of the Mactus group which owned SSWT, the plaintiff have trusted Kevin Tan to deliver the BURAN for the exhibition.

[45] At the end of March 2007, the plaintiff discovered that the BURAN was the subject of an ownership tussle in Bahrain, over non-payment of the sale of the BURAN from Molniya to SSWT. As a result of the ownership dispute which had developed into litigation, Mactus was unable to obtain the release of the BURAN and deliver the same for the exhibition pursuant to the Mactus agreement. The plaintiff claims this to be the cause which is 'beyond the control' of the insured and Mactus.

[46] However, apart from the ownership tussle with Molniya, the evidence disclosed that by May 2007, the ownership of the BURAN seems to have been vested in the German Museum. And from the letter dated 22 May 2007

from the Tourism Ministry to the plaintiff, the ministry directed the plaintiff to approach the legal representative of the German Museum to discuss the option for the sole purpose of getting the BURAN released so that it could be delivered to Malaysia for the exhibition. The letter reads:

> 3. Seperti yang pihak tuan sedia maklum, Kementerian Pelancongan telah pun mengadakan perbincangan dengan pihak tertentu di Bahrain bagi menyelesaikan masalah ini. *Namun mengikut En Lorenz Gluck, peguam Museum of Vehicle and Technology, pihak tuan harus berhubung dengan pihak museum tersebut atau NPO Molniya JSC bagi menyelesaikan masalah ini. Ini adalah amat penting bagi memastikan pesawat tersebut dapat dipamerkan di MIA2007.*

[47] The plaintiff did approach the legal representative of the German Museum for the discussion on 31 May 2007. This is documented in a letter dated 13 August 2007 from the plaintiff to the defendant. Pertinent in this letter is the fact that the German Museum has made a proposal for the conditional release of the BURAN. The said letter reads:

> May 31, 2007
>
> Laurent, the German Museum Lawyer called and he proposed to meet and to discuss further on the 'BURAN' issues. We agreed to meet at about 5.00 pm at the Crown Plaza Hotel Bahrain.
>
> The team had a long discussion with Mr Laurent on all possibilities. *He came up with a suggestion whereby he suggested Mr Kelvin Tan to surrender the ownership of 'BURAN' to NPO Molniya and 'BURAN' will be shipped out to Malaysia for the Malaysian International Aerospace Adventure 2007 Exhibition for 5 months* and from Malaysia, the 'BURAN' will be sent back to German Museum for their exhibition next year ...

[48] The evidence of PW5 and PW9 supports the content of the plaintiff's letter dated 13 August 2007 that the German Museum has made a proposal that the BURAN can be released and sent to Malaysia for the exhibition. But that proposal is conditional upon Kevin Tan giving up his claim for ownership of the BURAN.

[49] But the proposal was rejected by Kevin Tan. From the evidence of PW1, it seems that Kevin Tan did not agree to give up his claim because he had committed the BURAN to another exhibition in Hong Kong. In his evidence PW1 said:

> THL: Would you agree with me that it was unreasonable of Kevin Tan to refuse the proposal of the BURAN coming to Malaysia and then being returned to Bahrain subsequently and then he gives up his right on the BURAN? because he has already collected so much money, do you agree with me?
>
> Tan: No, he Kevin disagreed because Kevin had signed another contract in Hong Kong to have the exhibition in Hong Kong.

[50] And because of the said rejection, the BURAN was not released for the exhibition.

[51] I find that the refusal by Kevin Tan to accede to the German Museum proposal cannot be said to be reasonable bearing in mind that he had represented that they can and will secure the BURAN for the exhibition under the Mactus agreement. Because of that, Mactus was given a RM19 million contract to prepare for the exhibition.

[52] Bearing in mind that Kevin Tan had only paid USD160,000 (about RM500,000) for the BURAN, but was already paid more than RM12 million under the Mactus agreement, it makes more sense for him to accede to the proposal of the German Museum so that the BURAN can be brought to Malaysia for the exhibition. In fact, PW9 gave evidence that during the dispute with Molniya in the Bahrain Courts, the plaintiff has advanced USD300,000 to SSWT to pay Molniya. Again this USD300,000 can only come from the grant from the Tourism Ministry as the plaintiff themselves do not have the budget to stage the exhibition.

[53] I agree with the submission of the defendant that Kevin Tan had conducted himself deplorably for not resolving the legal dispute. Having convinced the plaintiff that SSWT owned the BURAN, and after being paid for more than RM13 million for the project, the least that he can do is to make sure that the BURAN can be brought to Malaysia for the exhibition.

[54] It is clear that Kevin Tan refused the German Museum's proposal for two reasons. One, he wanted to maintain his claim so that if he won, he could use the BURAN for future exhibitions. The other reason was that he would not have been able to complete the Hong Kong exhibition because he would no longer have any rights over the BURAN.

[55] As such, his decision was purely a commercial decision, after profiting RM13 million from the Malaysian deal, he intends to use the same BURAN for future deals. Therefore, it cannot be said that there was a supervening event that prevented him from acceding to the proposal so that the BURAN can be released for the exhibition. It cannot be said that it was legally or physically impossible to bring the BURAN for just a few months for the exhibition. The legal dispute does not qualify as a supervening event that makes it impossible to bring back the BURAN.

[56] As such, I find that it is plainly obvious that the non-delivery of the BURAN was not due to a cause beyond the control of Mactus, or its *alter ego*, Kevin Tan. As such, I find that the plaintiff have failed to show that they (the assured and the participant) have taken reasonable steps to avoid the event stipulated in the clause, that is, the cancellation of the exhibition due to the non-delivery of the BURAN.

[57] Therefore, premised on the evidence before me, I am of the considered opinion that the plaintiff has failed to prove on the balance of probability that the non-delivery of the BURAN was not due to a cause beyond the control

of the participant, Mactus, or its *alter ego*, Kevin Tan. As such, the plaintiff has failed to show that its claim falls within cl. 1.1 of the policy. Premised on this, the plaintiff's case is dismissed with costs.

Issue (iii): Whether The Grounds Of Repudiation Are Valid

[58] In the event that this court is wrong in its finding above, I will proceed to consider whether the defendant's repudiation of the plaintiff's claim is valid.

[59] The plaintiff's claim was repudiated by the defendant *vide* a notice dated 2 September 2009. The first ground of repudiation raised by the defendant is that the plaintiff has failed to make disclosure of material facts.

Non Disclosure Of Material Facts

[60] The first issue then is whether the plaintiff has failed to make disclosure of material facts. It is trite law that the burden of proof is on the insurer (defendant) to prove non-disclosure of material facts. (see *Azizah binti Abdullah v. Arab-Malaysian Eagles Sdn Bhd* [1996] 3 CLJ 426; [1996] 5 MLJ 569)

[61] The duty of disclosure is codified in Malaysia by s. 150 of the Insurance Act 1996, which provides as follows:

> 150 (1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that:
>
> (a) he knows to be relevant of the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or
>
> (b) a reasonable person in the circumstances could be expected to know to be relevant ...

[62] In *Chung Kuo Ping v. Malaysian Assurance Alliance Bhd* [2008] 3 CLJ 752; [2008] 1 MLJ 335, the Court of Appeal had referred to the case of *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330, where the principles of non disclosure of material facts was held as follows:

> (1) An insurance contract is a contract *uberrima fides*. As such it can be avoided for misrepresentation as well as non - disclosure of material facts. The obligation to disclose material facts arises regardless of whether the assured has been asked to complete a proposal form or had been asked any other questions by the insurer.
>
> (2) The assured is required to disclose all facts within his knowledge which would affect the mind of a prudent and experienced underwriter in determining whether he will take the risk and if so, at what premium and on what conditions.

[63] Therefore, the obligation is on the assured, the plaintiff, to disclose all material facts to the insurer, the defendant, when proposing for the event cancellation coverage for the exhibition.

[64] The next issue is what constitute 'material facts' for the purposes of disclosure. Both parties relied on the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd* [1995] 1 AC 501 which held that a material fact or material circumstance is one that would have an effect on the mind of the prudent insurer in estimating the risk and it is not necessary that it should have the decisive effect on his acceptance of the risk or on the premium demanded.

[65] Both parties are on common ground that the 'material facts' in this case is that without the BURAN, it was impossible to stage the exhibition.

[66] The defendant submit that the plaintiff has failed to disclose, either in the first proposal forms or in the Lloyds Proposal Form, that without the BURAN, they would not be able to stage the exhibition during the pre-contract negotiation stage, before the issuance of the policy on 7 February 2007.

[67] The plaintiff takes the position that they have disclosed the fact that the BURAN was essential to the exhibition, and that without it, the exhibition would certainly be cancelled. In his evidence (WSPW5), Mr Yeoh Kean Jin (PW5), who acted for the plaintiff to secure the necessary insurance coverage, said as follows:

> Q10: Were the Defendant's aware that the BURAN was the main exhibit at the exhibition and without it the event would be cancelled?
>
> A: Yes. We were very specific with them on this point that the BURAN was at all times the main exhibit at the show and without it the event would not go on. As can be seen from the Lloyds proposal form prepared by Willis on pg 212 Bundle B question 8 relates to the method of transporting the BURAN and its importance. It states there:
>
> 8.1 What mode of transportation will be used: BY AIR/AN225
>
> 8.1.2 for the equipment or items essential to the performance or event?
>
> "BURAN" Space Shuttle And Other Space Related Exhibits

[68] However, I am of the considered opinion that the plaintiff's reliance on Q8.1.2 in the Lloyd's Proposal Form is not tenable to establish disclosure of the material fact that without the BURAN, the exhibition must be cancelled. Question 8.1.2 only relates to the issue of the transportation of the space shuttle and other space related exhibits.

[69] With regards to the oral evidence given during the trial, the witnesses for the plaintiff gave evidence that they have informed the defendant that the BURAN is essential to the exhibition, and that without the BURAN the exhibition cannot go on. This was contradicted by the witnesses for the defendants.

[70] However, I am of the considered opinion that from the email dated 29 March 2007 between the defendant and the reinsurer, Swiss Re where the reinsurer enquired about the loss directly or indirectly related to the BURAN is excluded and DW1 replied that '**without BURAN, the event may not take place**'. The email exchange is as follows:

(from Khaled Moharram@swissre.com dated Thursday, March 29, 2007 3:18am)

> However, we understand that - irrespective of the BURAN - the exhibition will be opened to the public as scheduled. Please confirm that our understanding is correct, i.e, please confirm that any loss directly or indirectly related to the BURAN is excluded.

(reply from Jesudass Chettiah Thursday March 29, 2007 6:42pm)

> ... **Without the BURAN the event may not take place,** this is just to clarify your understanding, however, we have been assured that everything else (all other arrangements) are in order and the BURAN's delay will not have an effect on the launch date.
>
> We intend to restrict the policy by excluding any losses arising from late or non arrival of BURAN, but shall cover if such delay and non arrival are caused by marine perils.

[71] Even though the email exchange was after the issuance of the policy, I find that it disclosed the knowledge of the defendant that without the BURAN, the exhibition may not take place. Therefore, I find that the defendant knew the material fact that without the BURAN, the exhibition cannot go on. As such, I find that there is no issue of non disclosure of material fact, as the same is within the knowledge of the defendant. On the balance of probability, the defendant has known about this material fact, and this could have been disclosed by the plaintiff during the negotiations.

Issue (iv): Whether The Plaintiff's Claim Is Excluded By Cl. 6.3

[72] It is the defendant's contention that the plaintiff's has breached cl. 6.3 of the policy which reads as follows:

> This insurance does not cover any loss directly or indirectly arising out of, contributed to by, or resulting from any contractual dispute or breach by the assured.

[73] It is the plaintiff's submission that the phrase 'contractual dispute' must be read in the context of the phrase 'breach by the insured'. Therefore, the clause would exclude only losses that were caused by the insured own

actions or breach. The plaintiff submits that from this exclusion clause, it is clear that the intention of the parties is to limit the scope of cover to prohibit the insured from enlarging its claims by including losses arising from its disputes with other parties. Therefore, the plaintiff submits that losses cannot be taken to mean from disputes arising from the Mactus agreement.

[74] The defendant submits otherwise. It is the submission of the defendant that under the Mactus agreement, Mactus is to deliver the BURAN for the exhibition. When Mactus failed to deliver the BURAN, Mactus has breached cl. 5.1.1 of the Mactus agreement. Therefore, a dispute had arisen under the Mactus agreement. The plaintiff has failed to initiate any action under the Mactus agreement until the institution of the civil suit against Mactus only on 6 June 2013 in 22NCC-421-06/2013.

[75] Premised on these facts, the defendant submits that under cl. 6.3, the alleged loss, which was due to the cancellation of the exhibition arose directly or indirectly out of the contractual dispute between the plaintiff and Mactus, as the cancellation was due to the failure of Mactus to deliver the BURAN. Therefore, the alleged loss is excluded by cl. 6.3 of the policy.

[76] I do not find any ambiguity in cl. 6.3, and the words used should be given effect. Added to that, the use of the word 'or' is used between the phrase 'any contractual dispute' and 'breach by the assured' means that the clause must be read disjunctively. In *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1999] 3 CLJ 517; [1999] 1 MLJ 593, the Court of Appeal approved the disjunctive interpretation in a clause containing the word 'or' and said as follows:

> With the word 'or' in the words 'by reason of or in pursuant of a contract of employment' means, to the learned High Court Judge, that it should be read disjunctively. To read it conjunctively, he emphasised, would be doing violence to the word 'or'. He concluded that in reading disjunctively, the wife could obtain satisfaction as regards the judgment in the first suit against the insurance company by reason of her contract of employment with Tharmarajoo.

[77] Therefore, the exclusion of the losses cannot be limited only to the insured own actions or breaches as submitted by the plaintiff. The phrase 'any contractual dispute' is distinct from the phrase 'breach by the assured'. The phrase 'any contractual dispute' is wider and it includes the dispute between Mactus and the plaintiff under the Mactus agreement. This is especially so when the breach by Mactus was the sole cause for the cancellation of the exhibition. I am therefore of the considered opinion that under cl. 6.3 of the policy, since the alleged loss was due to the contractual dispute between the plaintiff and Mactus, the same is excluded under the policy.

[78] Thus, I am of the considered opinion that the defendant had validly repudiated the insurance claim because the plaintiff has breached cl. 6.3 of the policy.

Issue (v): Breach Of Cl. 7.4

[79] The defendant also claimed that the plaintiff has breached the condition precedent, cl. 7.4 of the policy. The defendant submits that the plaintiff did not comply with cl. 7.4 by taking reasonable steps to pursue all rights or remedies available to the plaintiff. It is not in dispute that the plaintiff only initiates legal proceedings against Mactus for breaching the Mactus agreement in 2013.

[80] In para. 451 of the defendant's written submission, the defendant cites the condition precedent cl. 7.4 as follows:

> It is a condition precedent to the liability of the Underwriters that in the event of any happening or circumstance which would give rise to a claim under the insurance, the Assured shall allow the Underwriters the right, if they so wish, to
>
> 7.4.3 pursue all rights or remedies available to the assured whether or not payment has been made hereunder.

[81] However, this clause stipulates that the plaintiff shall allow the defendant to pursue 'all rights or remedies' available to the plaintiff. There is no evidence that the plaintiff had breached cl. 7.4 by denying the defendant the right to pursue the remedies available to the plaintiff. Therefore, I find that there is no breach of cl. 7.4.

Issue (vi): Whether The Plaintiff Has Suffered Any Loss

[82] As this court has heard evidence on the issues of both liability and on quantum, I will also deal with the issue of the quantum of the loss allegedly incurred by the plaintiff.

[83] It is the submission of the defendant that the plaintiff did not incur any loss because it is not in dispute that the Tourism Ministry has practically footed the entire bill for the exhibition. In fact, the same public money was also used to pay RM4 million as director's remuneration. Therefore, the defendant submits that the plaintiff would simply be gaining an unwarranted windfall of more than RM30 million, in addition to the RM32 million of public money that they had spent for the exhibition. This, according to the defendant, will shock the conscience of any reasonable man.

[84] Under the policy, the plaintiff is entitled to seek an indemnity for expenses incurred. The defendant has instructed its loss adjusters, Crawford to investigate and adjust the loss. From the adjuster's report and the evidence before this court, the summary of the claim is as follows:

	Item	Amount (RM)
1.	Mactus	13,317,651.40
2.	Earth works	6,021,700.00
3.	Promotional items	1,385,972.87
4.	Other claims (including director's remuneration)	7,166,969.59
5.	Commissions	495,990.48
6.	Advertising	1,455,809.57
7.	Promotions	801,435.47
	Total	**30,645,529.38**

[85] I find that from the adjuster's report and the evidence before this court, the plaintiff had incurred cost and expenses in the sum of RM30,645,529.38. However, I cannot agree with the defendant that because the full expenses are from the taxpayers' money in the form of a sponsorship from the Ministry of Tourism, the plaintiff did not suffer any loss.

[86] I am of the considered opinion that factually the plaintiff did incur cost and expenses in this case. The amount spent may come from the sponsorship agreement, but under the said agreement, the rights, the obligations and the liabilities of the parties have been spelt out. Therefore, the sponsorship deal is a matter between the plaintiff and the Tourism Ministry. It is within the plaintiff's right to claim for the expenses incurred under the insurance policy, for the purpose of paying back the public fund. In is on this basis I find that if the plaintiff is to be indemnified under the policy, and since all the expenses were paid from the sponsorship from Tourism Malaysia, it is only proper that the same be remitted back to the Malaysian taxpayers. The sum of RM30,645,529.38 from the insurance claim is to be paid into the consolidated fund.

Conclusion

[87] Premised on the reasons enumerated above, I find that the plaintiff has failed to prove its case on the balance of probability that its claim falls within the insuring cl. 1.1 of the policy. I also find that the defendant has validly repudiated the plaintiff's claim as the plaintiff's claim arose out of or was contributed to or resulted from the contractual dispute (the Mactus agreement) and as such is excluded by cl. 6.3. The plaintiff's claim is therefore dismissed with costs.